



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

23rd Meeting, 2018 (Session 5)

Tuesday 18 September 2018

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Declaration of interests:** Fulton MacGregor will be invited to declare any relevant interests.

2. **Post-legislative scrutiny of the Police and Fire Reform (Scotland) Act 2012:** The Committee will take evidence, in round-table format, from—

Chief Superintendent Ivor Marshall, President, Association of Scottish Police Superintendents;

Councillor Elena Whitham, Spokesperson for Community Wellbeing, and Mike Callaghan, Policy Manager, COSLA;

Denise Christie, Scottish Regional Secretary, Fire Brigades Union Scotland;

Sandy Brindley, Chief Executive, Rape Crisis Scotland;

Professor Nick Fyfe, Founding Director, Scottish Institute for Policing Research.

3. **Proposed integration of the British Transport Police in Scotland into Police Scotland:** The Committee will take evidence from—

Humza Yousaf, Cabinet Secretary for Justice, and Donna Bell, Deputy Director, Police Division, Scottish Government.

4. **Subordinate legislation:** The Committee will further consider the following negative instrument—

Sheriff Court Fees Amendment Order 2018 (SSI 2018/194).

5. **Appointment of European Union Reporter:** The Committee will decide which of its members to appoint as its European Union Reporter.
6. **Justice Sub-Committee on Policing:** The Committee will consider a report back from the Sub-Committee meeting held on 13 September 2018.

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The papers for this meeting are as follows—

Agenda item 2

Private paper - Police and Fire Reform (Scotland) Act 2012 J/S5/18/23/1 (P)

Agenda item 3

Private paper - Integration of British Transport Police J/S5/18/23/2 (P)

Agenda item 4

Paper by the clerk - SSI 2018-194 J/S5/18/23/3

Agenda item 5

Paper by the clerk - EU Reporter J/S5/18/23/4

Agenda item 6

Paper by the clerk - Justice Sub-Committee on Policing J/S5/18/23/5

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Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following negative instrument, previously considered by the Committee at its meeting on 11 September 2018:

- [Sheriff Court Fees Amendment Order 2018 \(SSI 2018/194\)](#) [see page 3];

2. If the Committee agrees to report to the Parliament on the instruments it is required to do so by 24 September 2018.

Procedure for negative instruments

3. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).

4. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.

5. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.

6. Each negative instrument appears on the Justice Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.

7. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Guidance on subordinate legislation

8. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee’s web page at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>

Recommendation

9. **The Committee is invited to consider the instrument.**

SHERIFF COURT FEES AMENDMENT ORDER 2018 (SSI 2018/194)

Introduction

15. The instrument is made under by section 107(1) and (2) of the Courts Reform (Scotland) Act 2014. The Order amends the Sheriff Court Fees Order 2018 which makes provision for the fees payable in the sheriff court, to the sheriff clerk or the auditor of court, as appropriate.

16. Further details on the purpose of the instrument can be found in the policy note (see below).

17. The instrument comes into force on 28 September 2018.

DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

18. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 19 June 2018 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit. The DPLR Committee welcomed the Scottish Government taking the opportunity to revoke an article from the Sheriff Court Fees Order 2018 which the Committee had reported under the general reporting ground when scrutinising that Order.

JUSTICE COMMITTEE CONSIDERATION

19. The Committee first considered this instrument at its meeting on 11 September 2018. At that meeting the Committee expressed concern that the original instrument had contained an error which allowed certain exemptions for the commissary fees, and which had not been identified by Scottish Government officials before the instrument had been laid. The Committee agreed to write to the Scottish Government seeking an explanation of how this error had come about, and whether lessons could be learned to avoid repetition of errors.

20. A response from the Scottish Government was received on 13 September and is attached below. It states that all SSIs are subject to “an established and well-developed checking process” but that in this case human error while transcribing and re-ordering exemptions led to the mistake which is now being rectified.

The letter goes on to say that the Scottish Government “keeps the process for checking SSIs under review, learns from errors and makes improvements.”

Response from the Minister for Community Safety

13 September 2018

Dear Convener,

Thank you for your letter of 12 September 2018 regarding the Sheriff Court Fees Amendment Order 2018 (SSI 2018/194). The Scottish Government regrets the error within the Sheriff Court Fees Order 2018 that has necessitated the Amendment Order that is being considered by the committee.

The Scottish Government is confident that the process for bringing forward statutory instruments to Parliament is robust. Each SSI is led by a policy official working in combination with a drafting solicitor. Once in an advanced state the SSI is subject to an established and well-developed checking process. The Courts Fees Order was subject to the appropriate checks. Further, in the particular case of Court Fees Orders, consultation is also conducted with the Scottish Courts and Tribunals Service (SCTS) and the Lord President's Private Office as it is SCTS who have to operate the system in practice.

The committee will be well aware that Court Fees Orders are brought forward regularly. Most recently the 2018 Orders replaced equivalents from 2015, which were themselves amended in 2016. In general the fee exemptions that are in place "carry forward" from one Order to the next. In the 2018 round however, substantive changes were made to the exemption systems to expand their coverage, most notably to exempt particular types of Court processes that relate to domestic abuse. In transcribing and re-ordering the exemptions, as a result of human error, there was an omission that is rectified by the corrective instrument. The error lies only within the 2018 Order and not within either any previous Order or in underlying primary legislation.

The Scottish Government keeps the process for checking SSIs under review, learns from errors and makes improvements. However, as the Committee accepts, even with a rigorous quality control process, errors cannot be completely eliminated. The Scottish Government is committed to continuing its efforts to ensuring the quality of legislation that is brought forward to Parliament.

Ash Denham
Minister for Community Safety

Policy Note: Sheriff Court Fees Amendment Order 2018 (SSI 2018/194)

1. Court fees and fees for services offered by the High Court of Justiciary, the Court of Session, Sheriff Appeal Court, sheriff courts including the Sheriff Personal Injury Court, justice of the peace courts and the Office of the Public Guardian (OPG) ensure that those who make use of the courts or the OPG meet or contribute towards the associated costs to the public purse where they can afford so to do.
2. The Scottish Government made a package of instruments¹ amending court fees for financial years 2018/19 to 2020/21 which came into effect on 25 April 2018. Regrettably an error has come to light in the Sheriff Court Fees Order 2018 and this Order seeks to rectify the situation by amending that earlier instrument.
3. The Scottish Government is committed to ensuring a well-targeted system of fee exemptions exist. This means that those who require support will not incur any courts fees. The instruments, in force since April, enhanced the system of exemptions including by removing the court fee for certain civil interdicts

¹ The Court of Session etc. Fees Order 2018, the High Court of Justiciary Fees Order 2018, the Sheriff Appeal Court Fees Order 2018, the Sheriff Court Fees Order 2018, the Justice of the Peace Court Fees (Scotland) Order 2018 and the Adults with Incapacity (Public Guardian's Fees) (Scotland) Regulations 2018.

commonly used by those who have suffered domestic abuse. Fuller details are set out in the Policy Note for the Sheriff Court Fees Order².

4. Policy, and the practice reflected in the Sheriff Court Fees Order 2015 and previous court fees instruments, is that court fee exemptions do not apply to commissary business, which is the process for examining and taking inventory of estate following a death. They also do not apply to petitions for removal of disqualification from driving. This is because access to justice issues do not apply in respect of these cases in the same way as they arise in other court actions that are disputes between two parties. Accordingly, fees exemptions in the High Court of Justiciary Fees Order 2018 and in the Justice of the Peace Court Fees (Scotland) Order 2018 do not apply to petitions for removal of disqualification from driving. Additionally, in respect of commissary business there is no court fee for estates valued at under £50,000 so by definition anyone liable to a court fee is dealing with an estate of some value.
5. Unfortunately the Sheriff Court Fees Order 2018, in extending the court fee exemptions with the aim of enhancing access to justice for potentially vulnerable court users, inadvertently applied exemptions to the special classes of business referred to paragraph 5. This is against policy and previous practice and causes some financial and administrative consequences for Scottish Courts and Tribunals Service (SCTS).
6. Additionally, a redundant provision was identified by the Delegated Powers and Legal Reform Committee in their consideration of the Sheriff Court Fees Order 2018 and the opportunity is taken to remove it.

Consultation

7. A public consultation on these proposals was conducted on the original fees proposals. This amending order has been discussed with SCTS and the Lord President's Private Office.

Financial effects

8. The financial effects of the error are hard to quantify. There are a large number of commissary cases dealt with by SCTS each year. Court fee exemptions also have a fairly wide coverage. There will undoubtedly be people who therefore gain an exemption for the commissary fee that was unintended. It is therefore prudent to bring forward a rectifying instrument as quickly as possible. Additionally it is administratively difficult for SCTS staff to deal with a class of cases that does not accord with previous practice, training and operating procedures.

Impact Assessments

9. No impact assessments were conducted.

² http://www.legislation.gov.uk/ssi/2018/81/pdfs/ssipn_20180081_en.pdf

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Appointment of European Union Reporter

Note by the clerk

Background

The Scottish Parliament's European Union Strategy

1. The Committee is being asked to appoint a European Reporter as Mairi Gougeon MSP, was the previous European reporter, but is no longer a member of the Committee. Each subject committee is required to appoint an EU reporter.

2. A Parliament-wide strategy for European Union (EU) engagement and scrutiny was introduced following a Chamber debate on the European and External Relations Committee's 4th Report 2010 (Session 3) on the [Impact of the Treaty of Lisbon on Scotland](#). As part of this strategy, the subject committees and the then Equal Opportunities Committee took on an enhanced role in relation to early engagement on EU issues and the scrutiny of EU legislative proposals.

3. Part of that enhanced role for committees involves the appointment of an EU Reporter. Under Rule 12.6.2 of Standing Orders, subject committees and the Equal Opportunities Committee are responsible for appointing an EU Reporter—

12.6.2 Each subject committee and the Equal Opportunities Committee shall appoint a committee member (other than a committee substitute) (referred to as a "European Reporter") to bring to the attention of the committee any European Union ("EU") issue, proposal for EU legislation, or implementation of European Communities or EU legislation, as he or she may determine is appropriate.

4. Until the UK withdraws from the EU, it will continue to be involved in the decision-making processes relating to EU policies and will have an obligation to implement EU legislation. Thus, the Parliament's EU strategy will still need to consider EU matters. However, the Convener of the European and External Relations Committee has indicated that the role of EU reporters and the Parliament's annual process of identifying and reporting on EU priorities should be further developed to take into account the implications and process of leaving the EU.

The Role of the EU Reporter

5. Currently the role of the EU Reporter is to act as a "conduit" for EU matters within the Committee. This role remains relevant while the UK is still an EU Member State and will involve—

- Highlighting the EU dimension of the Committee's work;

- Taking the lead on consideration of any subsidiarity¹ concerns in relation to EU legislative proposals, or those proposals introduced by the UK Government in relation to the UK's ongoing relationship with the EU;
- Speaking to EU issues;
- Highlighting any EU dimension within policy debates; and
- Acting as liaison between the Committee and the Culture, Tourism, Europe and External Affairs Committee.

6. The Culture, Tourism, Europe and External Affairs Committee agreed that the role of the EU reporter will include the following additional elements—

- Identifying issues relating to the formulation of the UK's position on its future relationship with the EU that are relevant to the Committee's work and highlighting areas where the Committee may wish to undertake scrutiny work;
- Identifying issues relating to the process of leaving the EU that are relevant to the Committee's work and highlighting areas where the Committee may wish to undertake scrutiny work; and
- Liaising with the Culture, Tourism, Europe and External Affairs Committee on its work on the implications for Scotland of the vote in the referendum to leave the EU.

Decision

7. The Committee is invited to nominate a member to act as EU Reporter for the Committee.

¹ Article 5 of the Treaty on European Union: 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

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Feedback from the Justice Sub-Committee on Policing

Note by the clerk

1. The Justice Sub-Committee on Policing met on 13 September 2018 when it took evidence on Police Scotland's proposal to introduce the use of digital device triage systems (cyber kiosks) to interrogate mobile phone data throughout Scotland later this year.
2. The Sub-Committee previously took evidence on the acquisition and use of cyber kiosk technology at its meetings on 10 May and 21 June 2018. Following these evidence sessions, the Sub-Committee requested further information from Police Scotland and the Scottish Police Authority on scrutiny of the proposal to introduce this technology, the procurement process, and details of any impact assessments and training to be undertaken before the technology is used.
3. At its meeting on 13 September, the Sub-Committee took evidence from David Freeland, Senior Policy Officer, Information Commissioner's Office, Detective Chief Superintendent Gerry McLean, Head of Organised Crime and Counter Terrorism, and Peter Benson Cybercrime Forensic Team Leader, Police Scotland, and Diego Quiroz, Policy Officer, Scottish Human Rights Commission.
4. The Sub-Committee heard that Police Scotland intends to begin a phased roll-out of the cyber kiosk technology in early November 2018. This is dependent on a number of issues, which are currently being considered by the External Reference Group and the Stakeholder Group, being resolved.
5. The most significant issue is whether Police Scotland has the legal basis to use this technology to seize and interrogate the mobile phones of those who are accused of a crime or have witnessed a crime.
6. Other issues are the completion of equality impact assessments and human rights assessments, consideration of privacy, data retention and storage, and the training to be provided to officers in the use of this technology and in their awareness of the assessments and procedures to be followed.